JUN 19 1981

No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership, *Petitioner,*

v.

DONALD T. REGAN, the Secretary of the Treasury of The United States of America, THE UNITED STATES OF AMERICA, *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION OF FLAG, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF

BRICE M. CLAGETT
LAWRENCE T. MACNAMARA, JR.
DANIEL B. MAGRAW, JR.
PAUL G. GASTON
COVINGTON & BURLING
888 16th Street, N.W.,
Washington, D.C. 20006
(202) 452-6306

Attorneys for Amicus Curiae FLAG, Inc.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership, *Petitioner,*

v.

DONALD T. REGAN, the Secretary of the Treasury of The United States of America, THE UNITED STATES OF AMERICA, *et al., Respondents.*

MOTION OF FLAG, INC., FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

FLAG, Inc., hereby moves for leave to file a brief *amicus curiae,* pursuant to Rule 36, in order to apprise the Court of the interest of its members, the former American hostages in Iran and their families, in certain of the issues before the Court in this case. All of the parties except the intervening Iranian governmental entities have consented to FLAG's filing an *amicus* brief. The proposed *amicus* brief is attached hereto.

As is fully explained at pages 1-4 of the attached brief, FLAG clearly has an interest in the present case. The former hostages and their families had good and valuable claims against the Government of Iran which were extinguished by the Executive Orders and Treasury

Regulations implementing the Algiers Agreement, and the validity of that Agreement and of those Orders and Regulations is being challenged in the case before the Court.

If the former hostages and their families bring actions in the Court of Claims, they will argue that when the Government extinguishes, without recourse, valid claims of United States citizens against a foreign sovereign because of foreign-policy considerations, rather than settling or compromising such claims in the interest of the claimants, a taking of property has occurred which requires just compensation within the meaning of the Fifth Amendment to the Constitution. They will also argue that under the Tucker Act, 28 U.S.C. § 1491, the Court of Claims has jurisdiction over such a "taking" claim notwithstanding 28 U.S.C. § 1502, which provides that the Court of Claims does not have jurisdiction over any claim against the United States "growing out of or dependent upon" a treaty.

The question whether the Court of Claims has jurisdiction to hear such a "taking" case is present in the case before the Court because of the challenge to the constitutionality of the Algiers Agreement. Petitioner Dames & Moore explicitly raised the "taking" issue in its petition for certiorari (p. i). It thus necessarily, though implicitly, raised the Section 1502 jurisdictional issue. If a remedy for a taking is available through a Court of Claims action, then the taking itself is not unconstitutional. *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

The issue presented by the instant case concerning the jurisdiction of the Court of Claims to entertain actions for compensation for takings effected in the aftermath of the Algiers Agreement is the primary reason for

the filing of this motion for leave to file an *amicus* brief. For the former hostages and their families, whose claims against Iran have been unequivocally extinguished with no legal remedy substituted, the availability of Court of Claims relief notwithstanding Section 1502 is crucial. In addition, hostage "taking" claims will involve an issue concerning when and how the Algiers Agreement became effective. (*See* attached brief, p. 8, n. 4.) While that issue is not directly involved in the present case, it is important that the Court be aware of it if only to avoid language that might unintentionally prejudice claims not yet before the Court.

Because at least one court which considered the Court of Claims jurisdictional issue in the context of the Iranian cases decided that issue without explanation in a manner detrimental to the interests of the former hostages and their families (*see* p. 10 of the attached brief), because the interests of commercial claimants such as petitioner Dames & Moore (who may have access to the Iran-United States Claims Tribunal established by the Algiers Agreement) may not be the same as the interests of the former hostages and their families, and because there is no assurance that any of the parties to the present case will address these issues in depth, FLAG believes that the issues addressed in the attached brief may not be adequately presented by the parties before

the Court. FLAG therefore respectfully requests permission to file a brief *amicus curiae*.

Respectfully submitted,

BRICE M. CLAGETT
LAWRENCE T. MACNAMARA, JR.
DANIEL B. MAGRAW, JR.
PAUL G. GASTON
COVINGTON & BURLING
888 16th Street, N.W.
Washington, D.C. 20006

Attorneys for Amicus Curiae
FLAG, Inc.

June 19, 1981

TABLE OF CONTENTS

PAGE

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. The Extinguishment of a Valid Cause of Action Against a Foreign Sovereign for Foreign-Policy Reasons Is a Taking of Property Which Violates the Constitution Unless Compensation Is Available Through a Court of Claims Action 5

II. Section 1502 Does Not Preclude Actions for Compensation Based on the Taking of Claims Against Iran 10

CONCLUSION 15

TABLE OF AUTHORITIES

CASES:	PAGE
Agee v. *Muskie*, 629 F.2d 80 (D.C. Cir.) (MacKinnon, J., dissenting), *cert. granted*, 101 S.Ct. 69 (1980) (No. 80-83)	6
Aris Gloves, Inc. v. *United States*, 420 F.2d 1386 (Ct. Cl. 1970) (Nichols, J., concurring)	8
Blagge v. *Balch*, 162 U.S. 439 (1896)	8
Cushing v. *United States*, 22 Ct. Cl. 1 (1886)	8
Eastern Extension, A. & C. Telegraph Co. v. *United States*, 231 U.S. 326 (1913)	13
Ex parte Collett, 337 U.S. 55 (1949)	6
Falcon Dam Constructors v. *United States*, 136 Ct. Cl. 358 (1956)	13
Gray v. *United States*, 21 Ct. Cl. 340 (1886)	8
Holbrook v. *United States*, 21 Ct. Cl. 434 (1886)	8
Hughes Aircraft Co. v. *United States*, 534 F.2d 889 (Ct. Cl. 1976)	12
Judgment on the Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. *Iran)*, I.C.J. (May 24, 1980)	5
Langford v. *United States*, 101 U.S. 341 (1879)	8
Mallett v. *North Carolina*, 181 U.S. 589 (1901)	6
Marschalk Co. v. *Iran National Airlines Corp.*, No. 79-Civ.-7035 (CBM), slip op. (S.D.N.Y. June 11, 1981)	10
27 Op. Att'y Gen. 327 (1909)	8
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)	7, 11
Societe Anonyme des Ateliers Brillie Freres v. *United States*, 160 Ct. Cl. 192 (1963)	12
United States v. *Erdos*, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 879 (1973)	6

Table of Authorities Continued

CASES: PAGE

United States v. *Johnson*, 323 U.S. 273 (1944) 11

United States v. *Old Settlers*, 148 U.S. 427 (1893) 12

United States v. *Pizzarusso*, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968) 6

United States v. *Weld*, 127 U.S. 51 (1888) 12

STATUTES:

Tucker Act, 28 U.S.C. § 1491 ..... 9, 12

28 U.S.C. § 1502 ..... 4 *et passim*

28 U.S.C. § 1603(c) 6

28 U.S.C. § 1605(a)(5) 5, 6

International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* (Supp. 1979) 14

PENDING LEGISLATION:

S. 269, Bill To Amend 28 U.S.C. Relating to Federal Court Jurisdiction over Cases Arising from Acts of International Terrorism, Jan. 27, 1981, Introduced by Senator Dole 6

TREATIES AND EXECUTIVE AGREEMENTS:

Article 52, Vienna Convention on the Law of Treaties, 8 Int'l L. Materials 679 (1969) 9

Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 Int'l L. Materials 224 (1981): ..... 2 *et passim*

EXECUTIVE ORDERS AND FEDERAL REGULATIONS:

Executive Order 12283, Jan. 19, 1981, 46 Fed. Reg. 7927 (Jan. 23, 1981) 2

Table of Authorities Continued

EXECUTIVE ORDERS AND FEDERAL REGULATIONS: PAGE

Executive Order 12285, Jan. 19, 1981, 46 Fed. Reg. 7931 (Jan. 23, 1981) 3

Executive Order 12294, Feb. 24, 1981, 46 Fed. Reg. 14,111 (Feb. 26, 1981) 3, 14

Executive Order 12307, June 4, 1981, 46 Fed. Reg. 30483 (June 9, 1981) 3

Iran Assets Control Regulations, 46 Fed. Reg. 14,334 (Feb. 26, 1981) (to be codified as 31 C.F.R. § 535.216) 3

MISCELLANEOUS:

Commentary on the 1966 draft of Article 49, II Y.B. Int'l L. Comm'n 246-47 (1966), *quoted in* 14 Whiteman, Digest of International Law 273 (1970) . 9

W. Cowles, *Treaties and Constitutional Law: Property Interferences and Due Process of Law* 221 (1941) ... 8

Declaration of Alexander M. Haig, Jr., Secretary of State, Feb. 24, 1981 8

Statement of Interest in *American International Group* v. *Islamic Republic of Iran*, Nos. 80-1779 and 80-1891, D.C. Cir., filed February 1981, *as reprinted in* Iranian Assets Litigation Reporter 2530, 2556 (March 10, 1981) 9, 14

"Void *Ab Initio*: The U.S.-Iran Hostage Accords," 21 Va. J. Int'l L. 347 (1981) 9

White House Press Release, President Reagan to the Congress, Feb. 24, 1981 8

No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership, *Petitioner,*

v.

DONALD T. REGAN, the Secretary of the Treasury of The United States of America, THE UNITED STATES OF AMERICA, *et al., Respondents.*

BRIEF OF *AMICUS CURIAE* FLAG, INC.

FLAG, Inc., files this *amicus* brief to apprise the Court of the interest of its members, the former American hostages in Iran and their families, in certain of the issues before the Court in these cases.

INTEREST OF THE *AMICUS CURIAE*

FLAG, Inc., is a nonprofit organization which was incorporated in the District of Columbia on May 9, 1980, in succession to Family Liaison Action Group, an unincorporated association formed soon after the hostage taking on November 4, 1979. FLAG's original members were the wives and parents of the American hostages then held in Iran. Since the hostage release on January 20, 1981, the former hostages have also become members.

FLAG's purposes, as defined in its Articles of Incorporation, are:

> "to educate the general public about the international crisis caused by the taking of hostages at the American Embassy and at the Iranian Foreign Ministry in Tehran, Iran on November 4, 1979 (hereinafter referred to collectively as 'Hostages'); to assist in resolving that crisis by seeking the release of the Hostages by means consistent with United States law and policy; to secure humane treatment for the Hostages while awaiting their release; to secure the human rights of the Hostages as guaranteed by international law and the customs of nations; to provide for the assimilation of the Hostages into a normal life with dignity and honor upon their release; to provide a means of communication among the families of the Hostages that will enable them to share experiences and information; to acquire and disseminate to the public information that may prove useful in resolving both the current Hostage crisis and any similar situations in the future; and to make charitable contributions to the Hostages and their families in case of need."

While several former hostages or their families have filed suit against Iran (some before and some after the Algiers Agreement[1] was executed), the great majority have not. Before January 20, 1981, the hostage families were most reluctant to sue — a reluctance that was strongly encouraged by the State Department — lest the Iranians be inflamed and the release of the hostages jeopardized. The Algiers Agreement provides that the United States will "bar and preclude" all such hostage claims against Iran (General Declaration, ¶ 11). President Carter's Executive Order 12283 of January 19,

---

[1] Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 Int'l L. Materials 224-28 (1981).

1981, 46 Fed. Reg. 7927 (Jan. 23, 1981), directed the Secretary of the Treasury to promulgate regulations "prohibiting any person subject to U.S. jurisdiction from prosecuting in any court within the United States or elsewhere any claim against the Government of Iran arising out of events . . . relating to (1) the seizure of hostages on November 4, 1979, (2) their subsequent detention . . . ." The Secretary has issued such regulations. Iran Assets Control Regulations, 46 Fed. Reg. 14,334 (Feb. 26, 1981) (to be codified as 31 C.F.R. § 535.216). Executive Order 12283, along with President Carter's other orders implementing the Algiers Agreement, was "ratified" by President Reagan's Executive Order 12294 of February 24, 1981, 46 Fed. Reg. 14,111 (Feb. 26, 1981).

Another of President Carter's actions of January 19, 1981, Executive Order 12285, 46 Fed. Reg. 7931 (Jan. 23, 1981), established the President's Commission on Hostage Compensation, to make recommendations to the President within ninety days as to whether the United States should provide financial compensation to the hostages and, if so, how it should be determined and what if any legislation would be appropriate. Notwithstanding the ninety-day deadline (extended to August 20, 1981, by Executive Order 12307, of June 4, 1981, 46 Fed. Reg. 30483 (June 9, 1981)), the Commission is only now in the process of being organized and has not yet held any proceedings or deliberations.

It will be argued on behalf of the former hostages and their families before the President's Commission, before Congress, and if necessary in the Court of Claims that the hostages and their families had good and valuable causes of action against the Government of Iran which have been taken from them by the United States,

and that the value of those claims should be taken into consideration in any determination — whether administrative, legislative or judicial — of the amount of compensation to be paid the hostages and their families. Since certain of the issues involved in the present proceeding are relevant to these contentions, FLAG files this *amicus* brief to apprise the Court of the interest of the former hostages and their families in the relevant issues and to state its position concerning them.

It cannot presently be said which side this brief supports because the positions the respective parties will take on the issues of concern to *amicus* are not now known with certainty.

SUMMARY OF ARGUMENT

(1) When the Government extinguishes valid claims of United States citizens against a foreign sovereign because of foreign-policy considerations, rather than settling or compromising such claims in the interests of the claimants, a taking of property has occurred which is constitutional only if just compensation may be sought and, if owing, obtained by judicial remedy.

(2) Court of Claims jurisdiction of actions by plaintiffs whose claims against Iran have been extinguished or barred from the courts is not precluded by 28 U.S.C. § 1502. Section 1502 applies only when a right of action is founded on and created by an international agreement, which is not the case here. Moreover, Section 1502 is not applicable where, as here, the international agreement is non-self-executing and the actual taking was effected by Executive Orders and Treasury Regulations.

ARGUMENT

I. The Extinguishment of a Valid Cause of Action Against a Foreign Sovereign for Foreign-Policy Reasons Is a Taking of Property Which Violates the Constitution Unless Compensation Is Available Through a Court of Claims Action.

The seizure and detention of the hostages created causes of action on behalf of them and their families for, *inter alia,* kidnapping, false imprisonment and violations of federal statutes, international law and treaty rights. The International Court of Justice has held that the Government of Iran is responsible for the hostage seizure and is "under an obligation to make reparation to the Government of the United States" therefor, with the form and amount of such reparation to be determined later. *Judgment on the Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States* v. *Iran*), I.C.J., ¶¶ 90, 95 (May 24, 1980). That further determination was aborted when the United States had the case terminated, implementing the provision of the Algiers Agreement (General Declaration, ¶ 11) which required the United States to withdraw its claims before the International Court of Justice.

The hostage causes of action against Iran could have been brought in the United States district courts, though for reasons already explained only a few were in fact so brought; and they could be brought today had they not been barred by action of the Executive. Jurisdiction would lie, and the sovereign immunity of the Government of Iran would be waived, by virtue of 28 U.S.C. § 1605(a)(5), permitting actions "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tor-

tious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment . . . ." The term "United States" in Section 1605(a)(5) is defined to include "all territory and waters . . . subject to the jurisdiction of the United States." 28 U.S.C. § 1603(c). A United States embassy abroad is "subject to the jurisdiction of the United States" for many purposes. *United States* v. *Erdos*, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 879 (1973); *Agee* v. *Muskie*, 629 F.2d 80, 111, 115-16 (D.C. Cir.) (MacKinnon, J., dissenting), *cert. granted*, No. 80-83, 101 S.Ct. 69 (1980); *United States* v. *Pizzarusso*, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968). The embassy in Tehran is therefore within the statutory definition.[2]

---

[2] Even if 28 U.S.C. § 1605(a)(5) were held to exclude claims arising in United States embassies abroad, it is reasonable to believe that in the absence of the Algiers Agreement Congress would have acted to rectify what surely would have been recognized as an oversight on its part if the Foreign Sovereign Immunities Act turned out not to permit actions on claims like those of the hostages. Indeed, legislation to provide such express jurisdiction, S. 269, is now pending. Being jurisdictional, such legislation could readily be given retroactive effect. *See, e.g., Ex parte* Collett, 337 U.S. 55, 71 (1949); Mallett v. North Carolina, 181 U.S. 589 (1901). Finally, even if the courts of the United States were held closed to hostage claims by virtue of a narrow reading of Section 1605(a)(5), remedies elsewhere would have been available. The International Court of Justice had already indicated that it would award damages to the United States on account of the hostage claims, *supra*. And the courts of other States might well have been available, especially since the claims are grounded, *inter alia*, on violations of fundamental principles of international law of wide concern among most nations. (A number of American commercial claimants against Iran have obtained *quasi in rem* jurisdiction of their claims in European courts.)

Assuming the validity of the relevant provisions of the Executive Orders and Treasury Regulations which implemented the Algiers Agreement, the hostage claims have unquestionably been extinguished by the United States. In contrast to the commercial claimants, who may have recourse to the Iran-United States Claims Tribunal established by the Algiers Agreement, hostage claims against Iran are "barred and precluded" from any court whether in this country or abroad, and no substitute judicial remedy is provided. FLAG takes no position on whether implementation of the provisions of the Algiers Agreement dealing with lawsuits and claims violates the constitutional principle of separation of powers. FLAG does contend, however, that the extinguishment of hostage claims against Iran without recourse constitutes a taking of property which requires just compensation within the meaning of the Fifth Amendment to the Constitution. If a remedy for that taking is available through a Court of Claims action, then the taking itself is not unconstitutional. *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). The issue in the instant case concerning the jurisdiction of the Court of Claims to entertain actions for compensation for takings effected in the aftermath of the Algiers Agreement is the primary reason for the filing of this *amicus* brief.[3]

When the United States extinguishes causes of action against a foreign sovereign, and when its purpose in

[3] That question is not explicitly raised in Dames & Moore's petition for certiorari, but is implicitly and necessarily involved since Dames & Moore does raise the "taking" issue, Petition at i, and the *Rail Cases* make the availability of Court of Claims relief the decisive factor. The petition in American Bell International Inc. v. Islamic Republic of Iran, *et al.*, No. 80-2111, squarely raises the Court of Claims jurisdictional issue (pp. 17-18).

so doing is not a settlement or compromise of the claims in question but some unrelated foreign-policy purpose of the Government, compensation is due for a taking of property. *Gray* v. *United States*, 21 Ct. Cl. 340 (1886); *Cushing* v. *United States*, 22 Ct. Cl. 1 (1886); *Holbrook* v. *United States*, 21 Ct. Cl. 434 (1886); *see Aris Gloves, Inc.* v. *United States*, 420 F.2d 1386, 1395-97 (Ct. Cl. 1970) (Nichols, J., concurring); *Langford* v. *United States*, 101 U.S. 341, 344 (1879); 27 Op. Att'y Gen. 327 (1909); W. Cowles, *Treaties and Constitutional Law: Property Interferences and Due Process of Law* 221 (1941). *But cf. Blagge* v. *Balch*, 162 U.S. 439 (1896).[4]

---

[4] This is not the time to argue the merits of the hostage claims for just compensation, but we observe in passing, to show *amicus'* substantial interest, that the hostages are not necessarily precluded from meeting the test of *Gray* and *Aris Gloves* by reason of the fact that agreement by the United States to take action to extinguish their claims was necessary to procure their release from Iran and was therefore done for their benefit. That it was necessary on January 19, 1981, we do not doubt. But President Reagan, after a careful review and at a time when the hostages were safe, determined to carry out the Agreement on the ground that observance of its remaining executory provisions was in the foreign-policy interests of the United States. "Although the hostages have been released," he declared, "financial and diplomatic aspects of the crisis have not yet been resolved and continue to present an unusual and extraordinary threat to the national security, foreign policy and economy of the United States." President Reagan to the Congress, February 24, 1981, White House Press Release. "The Administration has determined . . . that the United States should implement these agreements because they are in the interest of the United States. They represent the surest way of resolving many of the financial problems between the United States and Iran consistent with the interests of U.S. claimants and the broader interests of the United States in the Persian Gulf area, a region of strategic importance to the United States." Declaration of Alexander M. Haig, Jr., Secretary of State, February 24, 1981, filed with United States Statements of Interest in various Iranian cases (*e.g.*, in American

Aside, therefore, from separation-of-powers questions, on which FLAG takes no position, the case before the Court should turn on whether the Tucker Act, 28 U.S.C. § 1491, is available to provide Court of Claims jurisdiction for causes of action against the United States founded on the assertion that the extinguishment of claims against Iran (or their exclusion from the courts) constitutes a compensable taking. The United States has argued that the issue is premature, but has reserved its position that 28 U.S.C. § 1502 deprives the Court of Claims of jurisdiction over such actions. Most of the

---

International Group v. Islamic Republic of Iran, Nos. 80-1779 and 80-1891, D.C. Cir., filed February 1981, *as reprinted in* Iranian Assets Litigation Reporter 2530, 2556 (March 10, 1981)).

It can be forcefully argued that the Algiers Agreement of January 19, 1981, was void *ab initio* because its acceptance by the United States was compelled through the exercise of duress (the taking and holding of the hostages) in violation of fundamental principles of international law. Article 52, Vienna Convention on the Law of Treaties, 8 Int'l Legal Materials 679 (1969); *see* "Void *Ab Initio:* The U.S.-Iran Hostage Accords," 21 Va. J. Int'l L. 347 (1981). If a State determines, once the duress exercised against it has been removed, to adhere to an agreement originally entered into under duress, the validity of the agreement derives from that subsequent determination and not from the originally void undertaking. Commentary on the 1966 draft of Article 49, II Y.B. Int'l L. Comm'n 246-47 (1966), *quoted in* 14 Whiteman, Digest of International Law 273-74 (1970). The Algiers Agreement that was effective so far as claims extinguishment is concerned was therefore made by President Reagan after the release of the hostages and for reasons entirely other than their welfare.

The issue whether the Algiers Agreement became effective and binding on January 19, 1981, or, as we contend, only upon President Reagan's decision the following month to observe it is not involved in the case before the Court, and we trust the Court's opinion will contain nothing that would preclude the former hostages from raising the point when their own claims are considered.

courts that have ruled on the constitutionality of the Algiers Agreement have found the "taking" issue, and therefore its Section 1502 aspect, premature on the ground that, as to commercial claims, it is too early to know whether domestic causes of action against Iran have been replaced by rights of equal value. Judge Duffy did reach the issue and held, without analysis, that Section 1502 precludes Court of Claims jurisdiction. *Marschalk Co.* v. *Iran National Airlines Corp.*, No. 79-Civ.-7035 (CBM), slip op. at 84 (S.D.N.Y. June 11, 1981).

For the former hostages and their families, whose claims against Iran have been unequivocally extinguished with no other legal remedy substituted, the availability of Court of Claims relief notwithstanding Section 1502 is crucial. If the Court should reach that issue in the present case, we respectfully request that the following arguments be considered.

II. Section 1502 Does Not Preclude Actions for Compensation Based on the Taking of Claims Against Iran.

The statute which the Government has alleged, in Statements of Interest filed with various courts in the Iranian cases, may preclude Court of Claims jurisdiction reads in its entirety as follows:

> "Except as otherwise provided by Act of Congress, the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations." 28 U.S.C. § 1502.

For two independent reasons, this provision does not prevent Court of Claims jurisdiction over an action for a constitutional taking by some one whose claim against Iran has been extinguished, terminated, suspended or

otherwise removed from the jurisdiction of United States courts.

Preliminarily, we observe that a contrary reading would present grave constitutional issues. If the Executive may wipe out property rights in the absence of jurisdiction in any court to determine whether compensation is owing, its actions would have to be subjected to the most critical scrutiny and could not stand if a taking were held to have occurred. When a statute is ambiguous, "construction should go in the direction of constitutional policy." *United States* v. *Johnson*, 323 U.S. 273, 276 (1944), *quoted with approval in Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974). As this Court held in the *Rail Cases*, " 'when one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is favored even if language . . . and arguably the legislative history point somewhat more strongly in another way.' " In that case, as here, the issue was whether statutory language precluded Court of Claims jurisdiction of a "taking" action.

An even more compelling case is presented when, as here, the executive action in question involves foreign-affairs matters of great national moment. If no right to seek compensation is available to those deprived of claims, the only judicial recourse is to examine the executive action alleged to constitute a taking and, if it is found that it does, to nullify it, with possible serious embarrassment to the Government's international position and harm to important national interests. If Section 1502 precludes claims based on takings that involve the exercise of the foreign-affairs power, then a constant risk would be presented that executive acts highly necessary to serve the nation's global purposes would have to be

overturned. The Tucker Act, if available, is a safety valve that avoids so dangerous a prospect.

These are forceful reasons to interpret the general language of Section 1502 as not precluding Tucker Act jurisdiction in the circumstances involved in the Iranian cases.[5] Fortunately, the courts have construed the section in a way fully compatible with such jurisdiction. In order to be precluded by Section 1502, the right upon which a claim is founded must "have its origin — derive its life and existence — from some treaty stipulation." *United States* v. *Weld*, 127 U.S. 51, 57 (1888); *accord, United States* v. *Old Settlers,* 148 U.S. 427, 468-69 (1893). "[A] case growing out of a treaty is one involving rights given or protected by a treaty . . . ." *Societe Anonyme des Ateliers Brillie Freres* v. *United States*, 160 Ct. Cl. 192, 196-99 (1963). A claim is not barred by Section 1502 merely because it would not have arisen "but for" a treaty. *Hughes Aircraft Co.* v. *United States*, 534 F.2d 889 (Ct. Cl. 1976).

Congress, it has thus repeatedly been held, intended in Section 1502 to bar only suits based on assertions that some language in a treaty, without more, expressly or implicitly conferred a right to a payment from the United States that was enforceable by a Court of Claims action. "By [Section 1502] Congress has withdrawn from litigation questions as to whether the United States has

---

[5] These reasons might also lead to a reading of Section 1502 as applying only to formal treaties, not to executive agreements such as that involved here. It has been held that "treaty" as used in Section 1502 includes executive agreements, Hughes Aircraft Co. v. United States, 534 F.2d 889 (Ct. Cl. 1976); but the serious constitutional implications of such a holding in cases such as the present might warrant reassessment if other grounds for reaching the constitutionally desirable result were not readily available.

done what it agreed by treaty to do." *Falcon Dam Constructors* v. *United States*, 136 Ct. Cl. 358, 364 (1956). "It is [the predecessor of Section 1502]'s evident purpose that the obligations of the United States directly resulting from a treaty should not be determined by the Court of Claims." *Eastern Extension, A. & C. Telegraph Co.* v. *United States*, 231 U.S. 326, 333 (1913).

Here, of course, the right that would be asserted in the Court of Claims — the right to compensation for a taking of property — is created by the Constitution and not by any treaty. The only involvement of an international agreement is that by entering into the Algiers Agreement the President promised to a foreign state that he would take that action which, once taken, arguably constitutes the taking of property. In no sense does the cause of action "derive its life and existence" from the Algiers Agreement. We have found no case in which Section 1502 has been held to preclude an action because the wrong complained of, rather than the right asserted, had some treaty connection.

There is an even simpler, equally conclusive, and independent reason why Section 1502 does not bar Court of Claims actions of the sort in question here. The Algiers Agreement is patently not self-executing. No claims or actions were terminated by the Agreement itself; the United States merely agreed to take steps to terminate them. As to the commercial claims involved in the instant case, the United States "agrees to terminate all legal proceedings . . ., to nullify all attachments . . . , [and] to prohibit all further litigation . . . ." Algiers Agreement, General Declaration, General Principle B. As to the hostage claims, the United States agreed to "promptly withdraw" the claims pending before the International Court of Justice, and "will thereafter bar

and preclude" such claims in domestic courts and elsewhere.

None of this, of course, had any self-executing effect. Executive Orders and Treasury Regulations were necessary to carry out these obligations and to give them any impact in domestic law.[6] It is those Executive Orders and Treasury Regulations, not the Algiers Agreement itself, which the United States has urged should be given effect by the courts. Nor do the orders and regulations even depend for their validity on the Algiers Agreement; the United States has consistently taken the position that they derive their authority from the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701 *et seq.* (Supp. 1979). It is the provisions of the Executive Orders and Treasury Regulations, not of the Algiers Agreement, which control in domestic law.[7] Thus a Court of Claims case of the sort here relevant would not require any reference to the Algiers Agreement or construction of its terms. The alleged taking would be founded solely upon the provisions and effect of the Executive Orders and Treasury Regulations applicable to the claims in question.

---

[6] In its various Statements of Interest in the Iranian cases, the Government has implied that it shares the view that the Algiers Agreement is not self-executing. The Government speaks of the need to "implement" the Algiers Agreement by the Executive Orders and the Treasury Regulations. *See, e.g.*, Statement of Interest of the United States, American International Group v. Islamic Republic of Iran, Nos. 80-1779 and 80-1891, D.C. Cir., filed February 1981, 1 and 8, *as reprinted in* Iranian Assets Litigation Reporter 2530, 2535, 2538 (March 10, 1981).

[7] For example, the Agreement appears to require "termination" of commercial claims in United States courts, but because of the language of Executive Order 12294 the Government has sought, and the courts have ordered, only their "suspension."

It follows that, even if the source of the taking, rather than of the right, were the critical fact under Section 1502, that section could have no preclusive effect here. If the United States took petitioner's (and the hostages') claims, it did so by Executive Order and Treasury Regulations, not by entering into the international agreement which, so far as domestic law is concerned, merely furnished the motivation for the Government in taking action against those with claims against Iran.

CONCLUSION

For the reasons stated, *amicus* respectfully requests the Court to hold, if it reaches those questions, that

(1) the extinguishment of a valid claim against a foreign sovereign, or a prohibition against legal remedies in pursuit of such a claim, may constitute a taking of property for which the Constitution requires the payment of just compensation, and

(2) the Court of Claims has jurisdiction of actions seeking such compensation; 28 U.S.C. § 1502 is no bar to that jurisdiction.

Respectfully submitted,

BRICE M. CLAGETT
LAWRENCE T. MACNAMARA, JR.
DANIEL B. MAGRAW, JR.
PAUL G. GASTON
COVINGTON & BURLING
888 16th Street, N.W.
Washington, D.C. 20006

Attorneys for Amicus Curiae
FLAG, Inc.

June 19, 1981